[No. 369—October Term, 1883.]

# SUPREME COURT OF THE UNITED STATES.

## WASHINGTON, D. C.

HENRY CLARKE ET AL.,

*vs.*

JOHN D. LEWIS ET AL.,

— AND —

JOHN D. LEWIS

*vs.*

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*BRIEF OF S. A. MILLER, OF COUNSEL FOR APPELLANT JOHN D. LEWIS.*

Moore & Moore, Pss. Charleston

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STATEMENT OF THE CASE.

John D. Lewis, the appellant in this cause, on the 2d day of February, 1874, conveyed, by deed, to George W. Norris and Henry Clarke, a tract of what was supposed to be 40,000 acres of land, situate principally in the county of Kanawha, State of West Virginia. This deed was acknowledged by the grantor, John D. Lewis, on the 5th day of February, 1874, by the grantee, George W. Norris, on the same day, and by Henry Clarke on the 20th day of the same month, and recorded in the County Court Clerk's

office, of Kanawha county, on the 23d of same month. It will be found on page 18, *et seq.*, of printed record. It purports to convey 40,000 acres, by metes and bounds, the exact quantity to be ascertained by a survey to be thereafter made. This deed consummated a negotiation which had been pending for some time between John D. Lewis and George W. Norris, one of the grantees. This is shown by the three contracts, one and the first dated 28th of September, 1872, (p. 381,) second dated 14th of May, 1873, (p. 382,) and the third dated 3d of September, 1873, (also p. 382 of printed record.) The narrative of events and circumstances and facts, occurring in this negotiation, are contained in the depositions of the appellant, John D. Lewis, (commencing on page 348, *et seq.*,) and S. A. Miller, (commencing on page 368, *et seq.*)

Under the terms of the deed of February 2, 1874, the purchase money was to be paid as follows:

$50,000 cash.
$25,000 1st day of October, 1874.
$25,000 1st day of April, 1875.
$50,000 1st day of January, 1876.
$50,000 1st day of January, 1877,

Or whatever was found to be the balance, when the acreage was ascertained,—all these amounts to bear interest from the 3d of June, 1873, said interest to be paid semi-annually, commencing January 1, 1874. In a subsequent portion of the deed, (p. 19,) the last payment was to be reserved until the decision of the suits and ascertainment of quantity of acres.

The cash payment of $50,000, and the $25,000 installment due 1st of October, 1874, with the interest on each from the 3d of June, 1873, were promptly paid by the appellee, Clarke. No subsequent payments have been made. It will be seen from the deed that there were sundry suits pending at its date, in which Lewis was defendant, involving the title to portions of these lands. At that time, the controversy involved had been, by the parties, submitted to arbitration. It was provided that these suits should be prosecuted to trial and determination, by the grantor, Lewis, with "all diligence." It was further provided that a survey should be made, under the direction of S. A. Miller, to ascertain the true quantity of acres. The order of submission to arbitration, existing at the

date of the deed, was made 21st of June, 1873, (p. 392, record.) On the 11th of December, 1874, after the deed was executed, this order of submission was set aside, for reasons stated therein. (See order, pp. 392 and 393.) At the January term, 1876, a trial was had of one of the suits, McMullen and Morrison vs. J. D. Lewis and others, without result. (See order, p. 394.) At the May term of the court, 1876, the suits were again submitted to arbitration, by a written agreement (pp. 394, 395 and 396). By this agreement, entered as an order of court, the arbitrators were named and the day fixed for the hearing and trial of the actions of ejectment, which were fourteen in number. The arbitrators met on the day appointed, 25th of July, 1876, and proceeded in the hearing and trial, and on the 24th of August following made their award. (See pp. 398, 399 and 400.) In the fourteen actions, the appellant, by the award, was successful in all but Nos. 2, 11 and 12. At the December term, 1876, rules were taken against the losing parties, by Lewis, to show cause why the awards should not be entered as the judgment of the court in the respective causes; and at the December term, 1877, judgments were entered in the suits, respectively, according to the awards. (See orders on pp. 400 to and including 407.) After the judgments were entered up by the Circuit Court of Kanawha, in favor of Lewis, in the said actions of ejectment, a writ of error was applied for, in all the cases, to the Supreme Court of Appeals of West Virginia, and, upon consideration of the questions arising in the petition and records presented, the application was refused. This order was made 23d January, 1880, and a copy found on pp. 212 and 213 of record.

The effect of this rejection is as final and complete as though the writ of error or appeal had been granted, and the cause heard and determined against the plaintiff in error or appellant. The statute of the State is quoted below:

Acts of Legislature of West Virginia, 1882, chap. 157, sec. 11, page 508:

"11. In a case wherein the court shall deem the judgment, de-
"cree or order complained of, plainly right, and reject it on that
"ground, no other petition therein shall afterwards be entertained.
"But the rejection of such petition by a judge in vacation, shall

"not prevent the presentation of such petition to the court when "in session."

In these cases, the petitions for writs of error were presented to the court while in session at Charleston, as appears from the order. (See record.)

Previous, however, to this, the appellant, John D. Lewis, had instituted a suit in chancery, in the Circuit Court of Kanawha county, against George W. Norris and Henry Clarke, for the specific performance of the contract contained in the deed of February 2, 1874. This suit was commenced 4th of June, 1875. (See copy of bill and exhibits, pp. 16 *et seq.* Demurrer to bill, p. 27. Answer of Clarke, pp. 28, 29 and 30.)

On the 17th of May, 1878, this cause was, on the motion of defendants Norris and Clarke, removed to the Circuit Court of the United States, at Parkersburg, and docketed in the latter February 19th, 1879. (Page 36.)

On the 28th of July, 1876, the suit in chancery of Henry Clarke, George W. Norris and J. Wilcox Brown *vs.* John D. Lewis, was instituted in the Circuit Court of the United States, at Parkersburg. (See bill, pp. 2 to 10. Answer of Lewis, pp. 10 to 14.

By an order of the latter court, on the 19th of February, 1881, the case of John D. Lewis *vs.* Henry Clarke and George W. Norris was consolidated with the suit of Clarke, Norris and Brown *vs.* John D. Lewis, and ordered to be heard and considered together.

After the consolidation of the two causes as aforesaid, and after the plaintiffs in the first suit, Henry Clarke et al. vs. J. D. Lewis, filed by leave an amended and supplemental bill—order 19th of February, 1879, (p. 35,) bill and exhibits, (pp. 35 to 67,) answer of J. D. Lewis, (pp. 88 to 93,)—on the 20th of February, 1879, the order of reference was made to Special Commissioner James F. Brown. On the 23d of June, 1879, Master Brown made his first report (commencing on pages 98 to 121). After the coming in of

this report, the court filed an opinion dated 1st of November, 1879, (pp. 155 to 157,) and on the 1st of November, 1880, entered the decree of that date, in conformity thereto, re-committing the report, upon certain principles, to Master Brown (pp. 157 and 158.)

The second report of the Master was filed on the 10th of March, 1881, (commencing on p. 158, *et seq.*) It is upon the opinion of the court, 1st November, 1879, the decree of 1st November, 1880, the second report of Master Brown, and the exceptions thereto, that, as is respectfully submitted, all the matter to be decided in this court, arise. The Master, in his second report, states the points arising under the last order of reference, by giving thirty different statements, all varying in amount. The appellant, John D. Lewis, excepts to all these statements, except Nos. 22 and 27. The first (pp. 176 and 177,) shows the balance due appellant, as of May, 1881, $153,844.35; the second, No. 27, (pp. 178 and 179,) at $163,141.50, with like interest. The principles upon which the two statements are made are the same, except that the latter gives interest at the end of each six months, according to the terms of the deed.

The final decree gives appellant Lewis $111,916.10, with interest from May 1, 1881.

It is contended, that, by all the principles that govern courts of equity, in decreeing specific performance, one of the two amounts claimed by appellant should be allowed.

## STATEMENT OF ARGUMENT.

It is respectfully submitted, that if any case could be presented for the specific performance of a contract, which fulfils all the essential elements required, this contract contained in the deed of February 2, 1874, entirely satisfies all the conditions. Lord Rosslyn says, in the case of Walpole vs. Oxford, 2 Vesey, 420: "I lay it down as a general proposition, to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined; secondly, they must be equal and

fair, for this court, unless they are fair, will not execute them; and thirdly, they must be proved in such manner as the law requires."

The deed, and the contract contained therein, from John D. Lewis to Henry Clarke and George W. Norris, of February 2, 1874, is certain and defined.

(1.) The price to be paid for the land is fixed and determined at $5 per acre.

(2.) The time when the payments of the purchase-money are to be made, is certain and distinct.

(3.) The time from which the purchase-money shall bear interest, is accurately and plainly stated.

(4.) The location and description of the lands are set forth.

(5.) The acreage is the only part of the contract which was not absolutely fixed by the deed, and the recitations in the deed show plainly and fully why that could not be done; it, however, provides how it was to be ascertained, and upon what future events it was to be determined.

(6.) The deed and the contract embraced in its provisions, are fully proved by the signatures and seals and acknowledgments of the parties thereto.

It is proposed to discuss, in this argument, how far any circumstance or matter arising under the contract in the deed, or in the evidence, can possibly, equitably or justly influence the court to do otherwise than enforce the terms of the deed, as plainly set out. In other words—what, if any thing, gives that discretion to the court, which is claimed it can exercise when it is called upon to enforce specific performance of a contract.

The first three propositions need no argument for their enforcement. They are certain and defined in the deed. They are as stated—first, the price per acre; second, the time when the purchase-money was to be paid by the vendees; and, third, from what date the said purchase-money was to bear interest—all are distinctly stated in the deed.

The fourth proposition, as to the description and location of the lands sold. They are described in the deed, "as three certain parcels or tracts of land contained and embraced within the exterior

boundaries of a survey of 40,000 acres, and granted by the Commonwealth of Virginia to Jacob Skiles, by Patent bearing date on the 11th day of July, 1798," &c., &c.; reciting the sale of the lands by the commissioners, Laidley and Matthews, on the 8th day of April, 1841, the payment of the purchase-money by the purchaser, John D. Lewis, the execution of the deed by the surviving commissioner, Laidley, on the 10th day of August, 1859, under an order and decree of the Circuit Court of Kanawha county, and then proceeds with the further locative description: "and which said several tracts of land are situate in the county of Kanawha, on Kelly's creek, Campbell's creek, Blue creek, and other tributaries of Kanawha and Elk rivers, and on Bell creek, tributary of Gauley river." It is hardly possible that the situation and locative and descriptive calls for so large a body of land, could be set forth in any deed, writing or contract, more fully or distinctly.

Fifth proposition, as to the acreage. It may be said and admitted that this is the only element of the contract contained in the deed, which was left in any sense uncertain and indefinite. But whilst this may be admitted, it cannot be denied that the factors and events upon which the precise acreage could be ascertained are provided for in the deed; that the causes which made the uncertainty upon the part of the deed, were set forth in the deed itself, and the vendees had full knowledge of those causes, and made their purchase with such full knowledge of this uncertainty. These are in substance as follows:

(*a*.) The deed says, "and it is further known there are sundry suits pending in the Circuit Court of Kanawha county, between the said John D. Lewis, as defendant, and Hale & McMullen, George Belcher, W. A. McMullen, J. L. McMullen and George M. Morrison, as plaintiffs, all of which are now submitted to arbitration, by an order of said Circuit Court; it is further agreed that any recovery of any lands, within the boundaries aforesaid, shall be and constitute no part of the lands herein sold and granted, but be deducted therefrom, at the said rate of $5 per acre, the said John D. Lewis agreeing to use all diligence in the prosecution of said suits, so as to obtain a speedy trial." (See seventh clause of deed.)

(*b.*) That under the eighth clause of said deed, the said J. D. Lewis reserved the right to 1,000 acres, unlocated, but described as lands heretofore improved by him, and adjoining tracts, with certain rights and restrictions as set forth in the said eighth clause of deed.

(*c.*) That the said Lewis had a right to re-acquire and quiet title to certain lands he had theretofore sold and embraced in the boundaries of the said sale, and if he failed in doing so, then there should be a deduction at the price of $5 per acre. (See ninth clause.)

(*d.*) That by the tenth clause of said deed, the last payment, of $50,000 *and interest*, is reserved until the decision of said suits and the ascertainment of quantity.

(*e.*) That by the sixth (6th) clause of the deed, "it was further understood and agreed that an accurate survey of the lands hereby granted, shall be made under the direction of S. A. Miller, of Charleston, *to ascertain the true quantity of land* intended to be granted," etc., then going on to describe the mode in which the survey is to be made.

All these clauses in the deed show, with entire certainty, that the true quantity could only be accurately ascertained by an actual survey, after the results set out in the points shown by the italic letters (a. b. c. d. e.) had been ascertained—though the quantity was approximately known by the parties, as shown by the deed of February 2, 1874, and the proofs in the case.

The terms of the deed sufficiently and fully comply with all the requirements of the principles of courts of equity, to authorize this court, in this case, to enforce specifically the contract contained therein, according to their very terms and conditions as to payment of the purchase-money and its interest, and the enforcement of the lien on the land, as reserved.

But it may be said there is a discretion resting with the court, in its equitable jurisdiction, in enforcing the specific performance of contracts. That such discretion exists, is not denied, but a short examination of its extent and application is respectfully submitted.

It is not an arbitrary, capricious discretion, synonymous with the mere pleasure of the judge; but a sound, judicial discretion, controlled by established principles of equity, and exercised by all the circumstances of the particular case. Where, however, the agreement is in writing, is certain in its terms, is fair and just in all its provisions, is for a valuable consideration, and is capable of being enforced without hardship to either party, it is as much a matter of course for a Court of Equity to decree its specific performance, as for a Court of Law to award a judgment of damages, upon its breach.

McComas vs. Easley, 21 Gratt., 23, 29, 30.
Hale vs. Wilkinson, 21 Grat., 75.
Pomeroy on Spec. Perfor., sec. 46.
Willard vs. Tayloe, 8 Wall., 557 and 567.

Applying these principles to the case at bar, it may be justly asked, where and how can the court change the terms of payment, or its interest, except by acts of grace and favor to the vendees? The points in the case, and the difference in the statements reported by the master, turn wholly upon the amount of the interest to be allowed. The contract is to pay interest upon the purchase-money, from the 3d day of June, 1873. This contract is not dependent upon the uncertain acreage, or upon the result of the suits, except as it determines the acreage, but upon all the lands which the vendees take by the deed, when the quantity is ascertained.

There can be no variation in this part of the contract. It is plain, distinct and full.

If any doubt could exist, it is settled by the tenth clause, which says, the last payment of $50,000, *and interest*, is reserved, until the decision of said suits and the ascertainment of quantity—ascertain the quantity of the land, in the manner prescribed, the price of $5 per acre is then fixed, and undisputed, and the interest commencing on the 3d day of June, 1873, is as entirely fixed and undisputed on the amount of purchase-money so ascertained.

But it is further contended that this payment of interest, provided as aforesaid by the deed, is hardship, because the vendees had no possession of the land in dispute in the several suits named in the

# SUPREME COURT

OF THE

# UNITED STATES.

NO. 399.

J. D. BAINES, ADM'R &C., APPELLANT,

*vs.*

HENRY CLARKE AND OTHERS, APPELLEES.

*Brief and Points of C. Boggess, of Counsel for Appellant.*

# SUPREME COURT

OF THE

# UNITED STATES.

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NO. 369.

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J. D. BAINES, ADM'R &C., APPELLANT,

*vs.*

HENRY CLARKE AND OTHERS, APPELLEES.

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*Brief and Points of C. Boggess, of Counsel for Appellant:*

After some negotiations between the appellee, Norris, and the appellants intestate Lewis, beginning as early as September, 1872 and continued until the 2d day of February, 1874, when an agreement was concluded between Lewis and the appellees, Clark and Norris, whereby the former executed and delivered to the latter a deed of conveyance with covenants of general warranty of a specific boundary of land at a certain price per acre, part to be paid in cash, and the residue at specified periods with interest thereon from the 3d day of June, 1873. Other agreements and stipulations were set forth in the said deed of the 2d of February, 1874. Among them an accurate survey was to be made of the land mentioned in said deed, under the direction and superintendance of Samuel A. Miller, to ascertain the true quantity of land intended to be granted.

That said Lewis was to use diligence in prosecuting certain suits then pending against him seeking to recover portion of said land, so as to obtain speedy trials thereof; and so much as should be recovered in said suits against said Lewis were to be considered as no part of the land granted in said deed, and should be deducted from the area mentioned therein at five dollars per acre. That Lewis was to reserve from the

operation of said deed 1000 acres of the surface of the said land so conveyed,except the timber thereon,and coal except so much as might be needed for domestic purposes; with the right of ingress and egress over the same for the use of the land conveyed.

That there should also be excepted from the operation of the said deed, certain parts of the said boundary of land, which said Lewis had theretofore sold to other persons, and which he might not be able to re-acquire thereafter.

That the last of the deferred installments which was to become due on 15th January, 1877, and the interest should be reserved until the decision of the suits referred to and the ascertainment of the land so sold and not accepted.

The arbitrators before whom the suits referred to were pending, made their award of the title on the 24th day of August, 1876, in favor of said Lewis to the whole thereof, which was within the bounds of said deed.

This award was, on the 20th day of December, 1877, made the judgment of the court wherein the causes were pending and under whose order the arbitration was directed.

On the 4th of June, 1875, Lewis filed his bill in the State court against Clark and Norris praying for a decree, to enforce his lien retained on said land for the purchase money then due and unpaid.

On the 28th of July, 1876, Clark and Norris filed their bill against Lewis in the U. S. Circuit Court, for the District of West Virginia, praying for a recision of the contract and deed of 2d February, 1874, on ground of defective title in Lewis. fraudulent representations by him and breach of covenants in not using diligence as agreed.

On 21st of May, 1878, the suit in the State Court was, on petition of the defendants, removed into the United States Court, and by it on the 19th of February, 1879, these end causes were consolidated and proceeded in together.

On the 20th February, 1879, the causes were referred to Commissioner James F. Brown (see page 87), to ascertain and report:

1st, What liens, if any, were on the lands at the date of the conveyance to Clark and Norris; their nature and amount due on each at the date of conveyance; payments made since, and amounts now due.

2, What land, if any,in the bounds of said deed had been sold

by Lewis before date of said deed, to whom sold; whether by deed, title bond or other written evidence; whether purchasers took possession under the purchases and paid the purchase money.

3d, The quantity of land contained within the said deed from Lewis to Clark and Norris; and the quantity remaining after deducting the amounts, if any, so sold by said Lewis.

4th, What other lands, if any, than those covered by the said deed, the said Lewis had title to at the date of said deed, or now holds; what incumbrances, if any. there were thereon at that date or since.

5th, Any further matter or thing which may be deemed pertinent, or required by either party in writing.

The commissioner made report under this order:

| | |
|---|---|
| 1st, The amount of the liens against the lands at time of deed, still existing | $14,547.88 |
| Or by allowing credit of $1,479.90— (See page 112.) | $13,046.98 |
| 2d, That Lewis, prior to 2d Feb. 1874, sold to sundry persons lands aggregating | 3,092½ acres |
| Lands above not re-acquired amounting in the aggregate | 1,392½ acres |
| 3d, Quantity of land within the bounds of the deed | 39,000 acres |
| Off for older titles not claimed by Lewis and for sales by him not re-acquired | 3.025 acres |
| Leaving residue (page 118) | 35,975 acres |
| 4th, Other lands owned by Lewis at date of his deed | 19,419 acres |
| Additional since then (page 119) | 2,700 acres |
| Liens now existing on all these lands (p. 120) | $61,964,89 |

To this report Clarke and Norris excepted because the commissioner did not deduct the land of which they had been evicted by C. P. Huntington.

On 1st November, 1880, the causes were heard and the court reached a conclusion, that it could neither rescind the contract nor enforce a specific performance of it. But, that it was its duty "to decree what is right and just between the parties opinion" (see pp. 155 6-7) And thereupon decreed that Lewis was entitled to be paid for 35,575 acres of land. It being the residue after deducting 3,025 acres according to commissioner's report, and 400 acres recovered by Huntington. And to further decree what was right between the parties referred the papers of the cause to James F. Brown a special commissioner to make a report for the final decree of

the balance to be paid by Clarke and Norris upon the following basis:

1st, "To ascertain what sum is to be paid for the lands that may not have been in dispute, with interest thereon, as stipulated in the contract of which Clarke had possession under the deed from Lewis."

2d, "To ascertain what sum is to be paid for the lands in dispute between Lewis as defendant, and Hale and McMullen and others as set forth in the contract, as plaintiffs, at $5.00 per acre, charging interest thereon only from the time the defendant Lewis by the final determination of the State tribunals established his title to the same."

3d, "To ascertain what amount of the purchase money is to be applied to the payment of the incumbrances on the land in the shape of a deed of trust referred to in the former report of the master, and any other incumbrances that may be upon the land in the shape of judgments, or decrees or any other liens and the amount necessary to discharge them; and in ascertaining the amount due from the vendees to the vendor, the master will take into the account the payments already made by the vendees.

4th, "The master will further report any matter or thing which he may deem pertinent, or which either party may in writing request. And he is also required to state any view upon the subject of interest, that either party may require." Under this order the master after having construed the words "*lands in dispute*" in the second requirement to mean, all the lands covered by the deed which were *claimed* by the plaintiffs in the suits referred to, viz.: 17,093 acres, and the "*final determination of the State tribunals*" to mean the time when the State Court entered judgment on the award—Dec. 27th, 1877, reported a mistake of 269 acres in the number of acres to be paid for as theretofore reported, making 35,844 acres instead of 35,575 as stated in the decree.

He further reported that of the 17,093 acres in "*dispute*" there were only 45 acres in *actual possession* of adverse claimants. And of the lands claimed by the defendants in the suit of Lewis against various parties there was only 120 acres in their possession making of all the land to be paid for only 165 acres held in adverse possession against Lewis at the time of the conveyance to Clarke and Norris.

The amount of money necessary to discharge the incumbrances upon the lands March 2d, 1881, was $15,778.40.

Besides these matters reported by order of the court other matters were reported at request of the parties.

The master made 30 different statements showing the balance of purchase money due from Clarke and Norris on 2d March, 1881, based upon the different interpretations of the order of reference by the court, and upon the views of the parties as to the interest charged. All these statements except Nos. 29 and 30 were excepted to by Clarke and Norris and all except Nos. 22 and 27 were excepted to by Lewis.

On the 19th of March, 1881, upon the final hearing the court overruled *all the exceptions* filed by both parties and proceeded to render a final decree in favor of Lewis, for the sum of $111,916.10 with interest from the 2d day of March, 1881.—From which decree Lewis on same day prayed for and obtained an appeal to this court.

## POINTS.

*First,* The sum which the court named in its decree should be paid to Lewis by the vendees, is erroneous and cannot be reached by a correct computation from any of the premises claimed by either of the parties, or stated in the report of the master, or assumed or found by the court.

*Second,* It was error for the court after having decided it improper, to rescind, or compel a performance of the contract to substitute in lieu thereof, a wholly different transaction from that contemplated by either of the parties. It should rather have dismissed the bills and left the parties to their remedies at law.

*Third,* The court in its opinion filed on the 1st of November, 1880 (pp. 155-6-7) seems to have misconceived or overlooked the character of the contract of sale of Feb. 1874, in supposing it to be a mere executory agreement on the part of Lewis, *to convey* upon the terms stated, when it was in fact a deed of conveyance with a covenant of general warranty.

The effect of which was to pass all the right, title and interest of Lewis in the lands described therein, to Clark and Norris from the date of its execution. All possession and right of possession of him, therein ceased in Lewis as of that date and passed to his grantees.

Such was the effect of that deed derived from the provisions of the statute law of the State which had been in force in Virginia since 1850, and was re-enacted in Chap. 71, §§ 4, 5 and 14 of the Code of West Virginia and are still in force.

*Sec.* 4 Provides that "all real estate shall, as regards the "conveyances of the immediate freehold thereof, be deemed to "lie in grant as well as in livery."

*Sec.* 5 Provides that "Any interest in, or claim to real estate

"may be disposed of by deed or will, any estate may be made "to commence in future by deed, in like manner as by will, "and any estate which would be good as an executory devise "or bequest shall be good if created by deed."

This was construed by Court of Appeals of Virginia, in case of Carrington vs. Goddin, 13 Gratt, 587.

*Sec.* 14 Provides as follows: "By deed of bargain and sale * * * the possession of the bargainor * * * shall be deemed transferred to the bargainee, * * * for the estate or interest which such person has in the use as perfectly as if the bargainee * * * had been enfeoffed with livery of seizin of the land intended to be conveyed by such deed." * And from the execution of said deed all damages from the unlawful use or detention of said land or any part of it was recoverable by Clarke and Norris and no one else. Lewis no longer had the right to the possesion. He had by his deed transferred all such right to his vendees to whom he had conveyed, and from that time they could have prosecuted a suit for any injury to their right of possession, or a suit for the use and occupation of it.

It is shown by the master's report, and not controverted, that Lewis at the date of the deed was in the *actual* possession of all the lands for which he claimed payment, except 165 acres adversely held by parties in the pending suits against him; and the land previously sold by Lewis and re-acquired by him after Feb. 1874. The right to the former passed instantly on the execution of the deed to Clarke and Norris, and to the latter under the covenant of general warranty as soon as Lewis re acquired it from those to whom he had previously sold *.

*Fourth*, The court erred in withholding from the plaintiff Lewis, interest on the purchase money for 19,716 acres of the land at the contract price from the 3d day of June, 1873 until the 23d day of January, 1880. 1st, Because the "*dispute*" consisting of the several suits referred to in the contract of sale was by the tribunal referred to therein and on the 24th of August, 1876, settled by an award made in favor of Lewis' title, and this award was, on the 20th of December, 1877, entered of record as the judgment of the court wherein the suits had been and were pending and to which the award had been returned.

If the *time* of determining the matters in dispute in the several suits was material, there is no principle upon which it could be postponed beyond the 20th of December, 1877, (the time when the award of the arbitrators was entered as the judgment of the court ), which would not as well apply to postpone it to any later period to which the losing parties might have continued their efforts to further litigate the

cases. The application to the Court of Appeals of West Virginia, for a writ of error might have been postponed for years later without prejudice to their rights, and they may still go to the courts to litigate their title. These parties could as well have petitioned for a writ of error three years earlier than they did, or might have postponed it five years later than they did, with the same result. Or, for that matter, may again petition and pray for such writ and if it should be allowed and after pending for years be dismissed as having been improvidently granted, and for such vexatious litigations by these parties, strangers to the contract of sale and to the parties to this suit, the purchasers, Clarke and Norris, by the same principle as governed the court in its decree under consideration would be exempt from the payment of interest on the unpaid and over due purchase money, although all this time they were in the possession of the land, and at the same time using the purchase money which was due the vendor.

The *petition* for a writ of error to the Supreme Appellate Court of the State, was an *exparte* proceeding, in no way effecting the judgment of 20th of December, 1877, or the title of Clarke and Norris to the lands or their right to the possession thereof under the judgment. It was not a continuation of the litigation or dispute, but a fruitless effort to that end.

2d, Because Clarke and Norris having accepted the deed for the land; took possession of it, the whole of it except 165 acres, (*See report of master, pp.* 190-195-196); and upon the judgment in favor of their grantor, they recovered the possession of this portion with the right to claim and recover as their own, the value of the use and occupation of it since their right began in February, 1874, they were in the absence of any agreement to the contrary bound in equity to pay to their grantor interest on the contract price for it from the time they became entitled to the possession of it or to the value of the use and occupation by other adverse to their title.

Mayo *vs.* Purcell, 3 Munf. 243.

Hundly *vs.* Lyons, 5 " 342.

Brockenbrough *vs.* Blythe, 3 Leigh 619.

Oliver *vs.* Hall, 1 Gratt. 298.

2 Sug. Vend. p. 794, bot. et. Seq.

It cannot be reconciled with any principles of justice, that the vendees should for more than six years take and hold under the deed to them the land, its rents and profits and for the same time take and appropriate the interest on its agreed money value. That merely because some one should *claim*

title to and seek by law to recover a piece of property, the purchaser might have during the legal controversy, the use of the property and the money to be paid as the price of it; is without authority of law.

3d, Because by the distinct terms of the contract of sale, free from any misrepresentation or fraud, Clarke and Norris agreed to pay interest on the purchase money from the 3d day of June, 1873, a period of more than seven years before the time fixed by the decree for the payment of it. This agreement was inserted in the deed of conveyance and with a recognition also therein of the adverse claim to part of the land and the pending suits in relation thereto with provisions made for the probable loss of a portion of the lands. And with all this knowledge and the provision for the contingent loss and the further provision to withhold the last payment due in 1867, until it should be known whether any, and how much, might be so lost, the vendees distinctly undertook and promised as part of the consideration for the land then conveyed to them, to pay interest not only from that time, but from a period long before the conveyance.

All these circumstances of adverse claim, litigation, delay and time of computing interest, were matters well known and duly weighed and considered by the parties in fixing the terms of their contract. And, they are stated just as they were understood and intended. No fraud was used in procuring the contract. Why then should another and different one be made by the court? Why should interest on a large sum of money which the parties with a full knowledge of all the circumstances agreed and bound themselves to pay, be withheld and the contract in that respect altered, and in lieu of it a different one enforced by the decree?

Clarke and Norris knew of the dispute in relation to the land, and the full extent of it and referred to it in the terms of the contract which were made with reference to it as well as the delay, and probable result, and the court it is submitted had no just power to relieve them from the obligation of this contract.

2d Sug. on Vend. pp. 793, et seq.

1 " " " pp. 235-236.

2 Story Eq. Jurisp. § 770, et Seq.

*Fifth*, It was error in the decree to credit Clarke and Norris with the 400 acres recovered by C. P. Huntington from John Lewis Taylor.

There is no evidence showing that they gave notice to Lew-

is of the suit and leave him as their warrantor to defend it, nor does it appear that they made any defense themselves. On the contrary, it does appear that they made no defense as was their duty, especially, when they failed to notify their warrantor to defend the land he had assured to them. A judgment of eviction under such circumstances is not sufficient evidence of a breach of warranty by Lewis.

*Sixth*, The true principles by which to ascertain the balance due and unpaid by Clarke and Norris, are more nearly approached by the master in the statements Nos. 22 and 27.

In the former the credit of $50,000 as of the 23d February, 1874, should have been made to extinguish $50,000 of the principal as of the 2d of February, 1874, which by the contract was to have been done, and which it was intended should not bear interest. This can be effected in this statement by computing interest on the $50,000 credit from the 3d of June, 1873, to the 2d of February, 1874, and add it to the credit of the 23d of February, 1874, leaving balance unpaid then of $151,773.96.

In the latter statement interest is erroneously computed on the value of the reacquired land amounting to 1412 acres, (see statement 22,) prior to the time they were so acquired by Lewis. By correcting it in this respect the same result would have been reached.

In the absence of any fraud or misrepresentation which could have misled the vendees; the title in no way defective after the crucial test which it was undergoing at the time of the contract, and no default in any way on his part, the vendor Lewis was entitled to have the amount due him ascertained in the way which he and his vendees had agreed and stipulated it should be ascertained, and he should not be made to accept in lieu thereof an abatement of one-fifth of the value of his land as adjusted and determined by him and his vendees, and add that to the profits of the vendees which they expect to make.

C. BOGGESS.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1883. No. 369.

J. D. RAINES, ADMINISTRATOR OF JOHN D. LEWIS, DECEASED, *Appellant*,

*vs.*

HENRY CLARKE, GEORGE W. NORRIS, AND J. WILCOX BROWN, *Trustees*.

## BRIEF OF

## WILLIAM PINKNEY WHYTE,

*Counsel for Appellees.*

IN THE

# SUPREME COURT OF THE UNITED STATES

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## STATEMENT.

By a contract, bearing date February 2, 1874, John D. Lewis, of Kanawha county, West Virginia, sold, with covenants of general warranty, to George W. Norris, of Baltimore, Maryland, and Henry Clarke, of London, England, a tract of land, situate in Kanawha county, West Virginia, known as the Jacob Skiles 40,000 acre survey, at the rate of $5 per acre. $50,000 was paid in cash; $25,000 was to be paid October 1, 1874; $25,000 to be paid on April 1, 1875; $50,000 to be paid on January 1, 1876; and $50,000, or whatever balance there might be, to be paid on January 1, 1877; all deferred payments to bear interest from June 3, 1873.

On the 23d February, 1874, Clarke paid $50,000; on the 3d March, 1874, he paid $2,141.65, and on the 4th October, 1874, he paid $27,008.33, making, in the aggregate, $79,149.98.

Finding the title to the lands purchased so clouded as to render insecure even the money already paid, Clarke and Norris refused to complete their purchase. On the 4th June, 1875, John D. Lewis filed his bill of complaint against the said Clarke and Norris in the Circuit Court of Kanawha County, West Virginia, praying for a specific performance of the contract aforesaid, and for the enforcement of his vendor's lien. On the 24th June, 1878, on the petition of Norris and Clarke, this case was removed to the Circuit Court of the United States, for the District of West Virginia.

On the 28th July, 1876, Henry Clarke, George W. Norris and J. Wilcox Brown, trustee, (the latter having become interested in the contract of sale by conveyances to him from Clarke and Norris,) filed their bill of complaint in the Circuit Court of the United States, for the District of West Virginia, praying for a rescission of the said contract of February 2, 1874, and for a return of the purchase money already paid, with interest thereon.

On the 19th February, 1879, by an order of that date, passed by the Circuit Court aforesaid, the two cases of Lewis vs. Clarke, &c., and H. Clarke, &c. vs. Lewis, were consolidated, and subsequently tried together.

On the 1st November, 1879, the Circuit Court delivered its opinion in the consolidated cases, refusing to rescind the contract of February 2, 1874, which was the relief prayed by Henry Clarke and others in their bill of complaint against John D. Lewis; and also refusing to decree a spe-

cific performance of the contract aforesaid, as asked for in the bill of John D. Lewis against H. Clarke and others, but holding the defendants, Clarke and others, liable to pay for the number of acres covered by the contract, to which Lewis could give them a clear title, and which lands were described in the commissioner's report, as confirmed by the Court.

The Court then referred the case to the master to "ascer-"tain what abatement of interest should be made from the "money stipulated to be paid by the contract for the lands "sold by Lewis to Clarke, by reason of the fact that such "lands were not in the possession of said Clarke and others, "and have not been, until the recent ascertainment of the "ownership, and to ascertain also what abatement should be "made of the interest due upon the sum to be paid by "Clarke and others to the defendant, Lewis, for the lands "which he stipulated to convey but had no title to dispose "of; charging interest only upon the purchase money from "the time the defendant, Lewis, by the determination of the "state tribunals, established his title to the disputed lands, "and was ready to convey them under the terms of the con-"tract, which is the subject matter of this suit."

Upon the coming in of the master's report, the Court passed its final decree, on the 19th day of March, 1881, declaring the complainant, Lewis, to be entitled to payment for 35,775 acres of land, at $5 per acre, under the contract, directing the amount of interest chargeable and the credits to which Clarke and others were entitled (Record, page 407). From that decree, the said Clarke, Norris and Brown, the complainants in the one case and the defendants in the other case, prayed an appeal to this Court, which was duly

allowed by order of the Circuit Court aforesaid, on the 30th March, 1881 (page 409).

After proper proceedings to perfect said appeal, the case was docketed, and on motion of the said parties the appeal was dismissed by this Court. On the 19th March, 1881, John D. Lewis, the complainant in the suit brought to compel the specific performance of the contract of February 2d, 1874, prayed an appeal from the decree aforesaid, which was duly allowed by the Circuit Court aforesaid, and upon the questions raised by that appeal this Court is asked to pass.

By reason of the elimination of the questions raised by the appeal of Clarke and others, a large part of the testimony and documentary evidence in the Record has no bearing on the present inquiry, and its consideration may be compressed within narrow bounds.

At the time of the preparation of this brief, no assignment, specifying in what the decree below is erroneous, has been made by the appellant, so that the appellees are compelled to maintain, in general terms, the correctness and propriety of the decree appealed from.

The Court was correct in not decreeing a specific performance of the contract of February 2d, 1874.

By the allegations of the bill of complaint, it is apparent that there were, at the date of the contract, many legal controversies "between the vendor and certain persons claiming posession of a portion of the land which is embraced in the contract, and which was agreed to be conveyed by the contract, by the complainant, Lewis, to the vendees," which land amounted to a large number of acres.

These controversies were not finally settled until the adjudication of the suits by the Supreme Court of West Virginia, on the 23d January, 1880, in favor of Lewis, to a considerable extent, but the rights of the claimants to 3,025 acres of land, covered by the contract of February 2d, 1874, were also sustained against Lewis, and that amount of acres was clearly deductible from the whole amount covered by the contract aforesaid. Refusal of writs of error, page 212.

It is manifest, therefore, that a Court of Equity could not, in view of these circumstances, decree a specific performance of the contract in question.

It is a conceded principle that this branch of the jurisdiction of such a Court is not a matter of right in the parties, and to be demanded *ex debito justitiæ*. The application, when this arm of the Court is invoked, is addressed to its sound and reasonable discretion, and is granted or rejected, according to the circumstances of the case. As was said by Lord Redesdale in 1 Sch. and Lef., 18: "I have no conception that a Court of Equity ought to decree a specific performance in a case, except where both *parties had, by the agreement*, a right to compel a specific performance, according to the advantage which they might be supposed to have derived from it, because otherwise it would follow that the Court would decree a specific performance, where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him he would be liable to its performance, and yet, if advantageous to him, he could not compel a performance."

The conclusion is, that the right to a specific execution of a contract depends upon whether the *agreement itself* is obligatory upon both parties, so that upon the application

of either against the other, the Court would coerce a specific performance.

By the agreement in this case, it is manifest that Clarke & Norris could not enforce their claim for a specific performance, because a large portion of the acreage contained in the Skiles tract was in litigation, and its extent could not be ascertained until the termination of those suits. There was an indefiniteness and uncertainty in the contract, and, indeed, in the mind of the vendor, as to the number of acres he had sold by the agreement or could sell under it.

At the time of filing his bill of complaint, the appellant's intestate was not in a condition to complete the title to the land sold, and the cases are abundant to show that unless a party *is ready* and competent to perform his part of the contract, he cannot call for a specific performance of the contract from the other side.

Benedict vs. Lynch, 1 John. Ch. Rep., 370, and cases cited by Chancellor Kent.

By the terms of the contract of February 2, 1874, it was provided, that if there was a failure of title to any part of the land conveyed therein, there is to be an abatement in price of $5 for each acre for which the title fails. It was represented to Mr. Clarke by agents of the vendor, as alleged by Clarke, that the amount of land in controversy was about 10,000 acres. It seems, that such was the impression, because the sum reserved out of the purchase money to abide the result of the disputes as to the land, was $50,000, the contract price of 10,000 acres at $5 per acre. It turned out, however, that there was a much larger part of the land in controversy. Clarke had paid for about 15,000 acres of land, leaving, in dispute, the balance of the tract.

Mr. Clarke's position was an unsafe one, and he was not compelled to pay any more money until the title to the balance of the land was cleared.

By the terms of the contract, an accurate survey of the lands was to be made, under the direction of S. A. Miller, of Charleston, as the representative of both parties; and that survey, made by Mr. J. S. Cole, and adopted by the special commissioner, in his report to the Circuit Court, and confirmed by it, shows the amount to be.....39,000 acres.

From this was to be deducted the land, of which there was a failure of title in Lewis, amounting to..... 3,025 acres

Residue.....35,975 acres.

[Record, page 117.]

In addition to this, there remained a dispute as to 400 acres of land, claimed by Huntington and others, which claim was sustained by the Court, and caused the further deduction of..... 400 acres,

35,575 acres.

At the final hearing, in March, 1881, there was discovered an error in the computation of the acreage, as made in the commissioner's first report, so that the Court added 200 acres in correction of the mistake, thus making the whole number of acres sold, and for which payment could be enforced by Lewis, in the aggregate, 35,775, at the price of $5 per acre. (Record, page 163.)

This is the full liability of Clark and Norris under the contract of February 2d, 1874.

Clarke had already made the payments hereinbefore referred to, and it remained to be ascertained with what interest the vendees were chargeable and to what amount of interest they were entitled on the payments made by them.

This was a money calculation to be made by the master.

The master made an exhaustive report, accompanied with thirty accounts variously stated.

From the evidence, and these sources of information, the Court decreed that the whole amount of acres to be paid for by Clarke and others, was..... 35,775 acres.

Deduct land in dispute, viz:

| | | |
|---|---|---|
| [Record, page 160,] Hale's suits..... | 17,093 | |
| [Record, page 162,] Other suits..... | 2,623 | |
| | | 19,716 acres. |
| Amount of undisputed land..... | | 16,059 acres. |

Upon this undisputed land the vendees were chargeable with interest from June 3, 1873, to March 2, 1881, (a day agreed upon.)

| | |
|---|---|
| This 16,059 acres of land, at $5 per acre, amounted to..... | $80,295 00 |
| Interest from June 3, 1873, to February 23, 1874..... | 3,479 85 |
| | $83,774 58 |
| Cash paid February 23, 1874..... | 50,000 00 |
| | $33,774 58 |
| Interest from February 23, 1874, to March 3, 1874..... | 50 67 |
| Amount carried forward..... | $33,825 25 |

| | |
|---|---|
| Amount brought forward | $33,825 25 |
| Cash paid March 3, 1874 | 2,141 65 |
| | $31,683 60 |
| Interest to October 4, 1874 | 1,114 18 |
| | $32,797 78 |
| Cash, then paid | 27,008 33 |
| | $5,789 45 |
| Interest from October 4, 1874, to March 2, 1881 | 2,226 96 |
| | $8,016 41 |
| Number of acres in dispute, and for which title was only confirmed by Supreme Court of West Virginia, as of the 23d January, 1880, 19,716 acres, (Record, page 212,) at $5 per acre | $98,580 00 |
| Interest from January 23, 1880, to March 2, 1881 | 6,522 71 |
| | $113,119 12 |
| Certain lands which had been sold to other parties were only reacquired just prior to March 2, 1881, and the Court allowed interest on the principal of their value, as of March 2, 1881 | 1,203 00 |
| Thus making the whole | $111,916 12 |

This amount of debt was decreed by the Circuit Court to be due by Clarke & Norris to John D. Lewis, as of March 2, 1881. By the report of the master, it appeared there were outstanding valid liens upon the property, amounting in value

to $15,778.40, as of March 2, 1881, and the appellees were authorized to pay these sums, and to be entitled to credits for such payments, as if made by the vendees directly to John D. Lewis.

This was in strict accordance with the principles of equity jurisprudence.

> Poole vs. Thergold, 2 Bro. C. C. 118.
> Poole vs. Thergold, 1 Cox, 273.
> 2 Kent Com. 475.
> Stoddard vs. Smith, 5 Binn. 355.

The abatement of interest was properly made, for it would have been highly inequitable, while the lands were not in the possession of Clarke and others, and could not be entered upon by them, to be made of value, either by cutting timber or mining for the minerals in that mountainous region, to hold the vendees responsible for interest upon payments which it was not safe for them to make in the clouded condition in which the title of the land stood until January 23d, 1880.

Moreover, owing to the delay of Lewis in securing the survey of the lands by a competent surveyor, as provided in the contract, and in not removing the cloud upon the title by the trial of the pending ejectment suits or by their disposition through arbitration, as had been proposed, the vendees gave him written notice on the 12th February, 1875, "that they would not be responsible for interest on the purchase money (Record, page 285), nor were they, under the circumstances, liable in law for interest.

Where there is weighty objection to the title the purchaser is not bound to take possession, nor, consequently, to pay interest until the title is cleared up.

Forteblow vs. Shirley, 2 Swanst., 223.
Carrodus vs. Sharp, 20 Beav., 56.

All that the appellees now ask is, that the decree, determining the number of acres of land to which they are entitled under the contract of February 2d, 1874, and fixing their exact liability therefor, may be affirmed by this Court.

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